Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 071342

In The

Supreme Court of the United States

Donald A. Russell,

Petitioner

v.

Commonwealth of Virginia

Supreme Court of Virginia

Respondent

On Petition For Writ Of Certiorari

To The Supreme Court Of The United States

PETITION FOR WRIT OF CERTIORARI

Donald Russell

1306 East Cary Street

Richmond, VA 23219

804-787-1305

Questions Presented

1. Violation of The Sixth Amendment under the United States Constitution which allows the right to cross-examine witnesses, also applies to physical evidence...providing the defense ample opportunity to cross-examine its validity and meaning was denied and is in question.
2. Violation of The Fifth Amendment under the United States Constitution which states "No person shall be... deprived of life, liberty, or property with out due process of law..." Being Innocent until proven guilty which derives from the Fifth Amendment under the United States Constitution is being questioned.

PARTIES TO PROCEEDING

Donald A Russell **Petitioner**

Commonwealth of Virginia's Attorney,

Randy Leach Roanoke County, VA

TABLE OF CONTENTS

JURISDICTION.....iiii

STATEMENT OF THE CASE.....1

REASONS FOR GRANTING THE WRIT.....6

CONCLUSION.....8

INDEX TO APPENDICES

APPENDIX A---Virginia Supreme Court Petition for Rehearing January 22nd, 2008

APPENDIX B---Court of Appeals of Virginia Petition for Rehearing August 9th, 2007

APPENDIX C ---Court of Appeals of Virginia - -Case Dismissal July 13th, 2007

EXHIBITS

EXHIBIT A---Intoxilyzer 5000 Training Manual Printed Output

EXHIBIT B---Administrative Suspension

EXHIBIT C---Certificate of Breath Analysis

EXHIBIT D---Minnesota Supreme Court Case

TABLE OF AUTHORITIES CITED

CASES	PAGE
Dale Lee Underdahl v Commissioner or Public Safety State of Minnesota In Supreme Court	4
Brown v. St. Paul City Ry. Co., 241 Minn. 15, 35-36, 62 N.W.2d 688, 701-02 (1954)	5

OTHER

David Louisell (Discovery and Pre-Trial Under The Minnesota Rules)	6

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **state courts**:

The date on which the highest state court (Supreme Court of Virginia) decided my case was January 22nd, 2008. A copy of that decision appears at Appendix A

The date on which the Court of Appeals of Virginia decided my case was July 13th, 2007. A copy of that decision appears at Appendix B. A notification of appeal was filed in proper person on May 9th, 2007, I was told to await a letter providing me the next steps. No letter was ever received and the time allowed by law within which to file a petition for appeal had expired.

A Petition for Re-hearing was thereafter denied on the following date August 9th, 2007.

A copy of that petition appears at Appendix C.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Virginia was entered

on January 22nd, 2008.

A Petition for Appeal was received on September 7th, 2007 and dismissed on November 13th, 2007. A timely request for rehearing was received November 26th, 2007 and was denied on January 22nd, 2008.

STATEMENT OF THE CASE

The nature of this case involves operating a motor vehicle with a blood-alcohol content of over .08. The case was heard in Roanoke County, Virginia. I contend and set to prove that Constitutional Rights were ignored by the Commonwealth of Virginia.

It was error for the lower court (Circuit Court of Roanoke County) to allow the certificate of breath analysis in the motion hearing without providing me my Sixth Amendment Right of Cross-Examing the Commonwealth of Virginia's evidence against me. I was denied important information from the Commonwealth of Virginia. Crucial information that is readily available from the Breath Test Machine (Intoxilyzer 5000). The Intoxilyzer 5000 collects the information I requested, and other states using the Intoxilyzer 5000 provide this information. The Commonwealth elects not to provide a printout of the time each breath test is taken, when the machine re-

calibrates itself, and that the starting range is .00 (Please see Exhibit A) The Commonwealth elects to only provide one time printed stamp of the lowest test. It has been my sworn testimony that the Intoxilyzer 5000 was malfunctioning on that evening, and without being able to cross-examine the Intoxilyzer 5000 and be provided with a standard report that the Intoxilyzer 5000 provides I could not make an ample defense of my claim. The lower court judge asked for the information on the amount of time between breath attempts, the machine is capable of providing him with that information in helping him make an informed decision. The Division of Forensic Sciences in the Commonwealth of Virginia chooses not to disclose the report that shows individual breath test times. Not all "Intoxilyzer 5000's" are the same. Virginia's model was specifically

designed/manufactured for Virginia. The Division of

Forensic Science claims it is the Intoxilyzer 5000CD/FG5 model. Many other states use a version of the Intoxilyzer. It is important to know both how the machine works and the proper operation procedure in order to spot testing irregularities, inaccuracies, and flaws. The Commonwealth of Virginia does not grant one to question or seek further evidence of their version of the Intoxilyzer 5000.

The arresting officer in the case violated my 'innoncence until proven guilty' and presumed he had a conviction and would find me guilty. It was not due Constitutional process for the arresting officer to administratively suspend my license, before the breath test was given. (Exhibits B & C) The officer filled out the paperwork and gave his signature that I had a blood alcohol content of .08 or higher before the breath test was given. The administrative suspension was given at 2:11am, however the Certificate of Breath

Analysis (tests) was completed at 3:35am.

The Supreme Court of Minnesota has ruled that "drivers tested using the Intoxilyzer 5000 should have full access to all of the information employed by that Instrument (Exhibit D)

Dale Lee Underdahl Respondent

Vs

Commissioner of Public Safety, Appellant

Minnesota Rule of Civil Procedure 34.01 provides that a party may serve a request for production of documents and tangible things "which constitute or contain matters

within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served" The party objecting to the production of information has the burden of

establishing that the sought-after information is immune from discovery. Brown v. St. Paul City Ry. Co., 241 Minn. 15, 35-36, 62 N.W.2d 688, 701-02 (1954)

A request was made and refused by the Virginia Division of Forensic Sciences for the needed information involving the Intoxilyzer 5000.

Reasons For Granting The Writ

It is a Constitutional right that those being charged with a crime should have every right to question the evidence that is being presented to try to convict them, and evidence that can be used to cast a doubt on ones guilt should be available. I feel as though this basic constitutional right is being impeded upon in the Commonwealth of Virginia, and possibly unjustly convicting residents and non-residents in the State of Virginia. The Commonwealth of Virginia should be required to provide detailed information on computerized instruments it uses to prosecute, without this, one can not make an adequate defense. "A lawsuit should be an intensive search for the truth, not a game to be determined in outcome by consideration of tactics and surprise." (quoting David Louisell, Discovery and Pre-Trial Under the Minnesota Rules, 36 Minn. L. Rev. 633, 639)

This case is with merit and very worthwhile in assessing its potential applicability in future cases. This case has national importance that the Supreme Court should decide upon. It is unconstitutional and also conflicting with another appellate court that the Commonwealth of Virginia is able to have custom made and designed evidence (Intoxilyzer 5000 – Virginia Model) that is used against an accused and the accused not having the ability to thoroughly question the results that are being used to get convictions. The right granted to an accused by the sixth amendment to confront the witness or evidence against him, which includes the right to cross-examination, is a fundamental right essential to a constitutionally fair trial and is made obligatory on the states by the fourteenth amendment. I ask that you take this petition seriously and take the time to review the exhibits. The importance to the public on this issue should be recognized.

I have written this Writ Pro Se, and apologize if any errors were made in following standard procedures. I attempted to get counsel to assist in my appeals process, and for a lack of their time, or an exuberant fee I was unsuccessful in having such legal expertise and guidance.

CONCLUSION

The Petition for a writ of certiorari should be granted

Respectfully submitted,

Donald Russell

Donald A. Russell

1306 C East Cary Street

Richmond, VA 23219

804-787-1305

April 15th, 2008

NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

DONALD A. RUSSELL - - -PETITIONER

VS.

COMMONWEALTH OF VIRGINIA - - -RESPONDENT

PROOF OF SERVICE

I, Donald Russell, do swear or declare that on this date, April 16th, 2008, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Commonwealth's Attorney for Roanoke County, Ed Leach

305 East Main St. Salem, VA, 24153

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 2008 Daniel Russell

Sample Certificate Of Compliance With Word Count

Certificate Of Compliance

No._____

Donald A. Russell

Petitioner

V.

Supreme Court of Virginia

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of Certiorari contains

____969_____ words, excluding the parts of the petition that are exempted by the Supreme Court Rule 33.1 (d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 18, 2008

APPENDIX A

Tuesday 22nd January, 2008

Donald A Russell, Appellant,

Against Record No. 071823

Court of Appeals No. 1088-07-3

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 13th day of November, 2007 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L.

Harrington, Clerk

By:

Deputy Clerk

APPENDIX B

In the Court of Appeals of Virginia on Friday *the* 13th *day of* July, 2007.

Donald A. Russell Appellant,

against Record No. 1088-07-3

Circuit Court No. CR06000932-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Roanoke County

It appearing to the Court that the record in this case was filed in this Court on May 9, 2007; and it further appearing that no petition for appeal has been filed, and that the time allowed by law within which to do so has expired, it is ordered that the case be dismissed, and that the record be returned to the trial court.

The Commonwealth shall recover of the appellant the costs in the trial court. This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

APPENDIX C

In the Court of Appeals of Virginia on **Thursday** *the* **9th** *day of* **August, 2007.**

Donald A. Russell, Appellant,

Against Record No. 1088-07-3

Circuit Court No. CR06000932-00

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 13th day of July, 2007 and grant a rehearing thereof, the said petition is denied.

A Copy,

Teste:

Cynthia L. McCoy,

Clerk

By:

Deputy Clerk